United States Department of Labor
Employees' Compensation Appeals Board

D.B., Appellant	)	
and	)	**Docket No. 06-918**
	)	**Issued: October 11, 2006**
DEPARTMENT OF THE NAVY, PORTSMOUTH NAVAL SHIPYARD, Portsmouth, NH, Employer	)	

Appearances:
Appellant, pro se
Office of Solicitor, for the Director

Case Submitted on the Record

DECISION AND ORDER

Before:
ALEC J. KOROMILAS, Chief Judge
MICHAEL E. GROOM, Alternate Judge
JAMES A. HAYNES, Alternate Judge

JURISDICTION

On March 13, 2006 appellant filed a timely appeal of a January 11, 2006 decision of the Office of Workers' Compensation Programs, finding that his request for reconsideration was untimely and failed to show clear evidence of error. Pursuant to 20 C.F.R. § 501.3, the Board's jurisdiction is limited to decisions issued within one year of the filing of the appeal. Since the last merit decision was issued May 19, 2004, the Board does not have jurisdiction over the merits of this case.

ISSUE

The issue is whether the Office properly refused to reopen appellant's case for merit review under 5 U.S.C. § 8128(a) on the grounds that appellant's application for reconsideration was untimely and failed to show clear evidence of error.

FACTUAL HISTORY

The Office accepted that appellant sustained degeneration of a cervical intervertebral disc as a result of his federal employment. By decision dated November 20, 2003, the Office

determined that appellant had not established impotence as an employment-related condition. In a decision dated May 19, 2004, the Office denied modification of the November 20 2003 decision. It also found that the condition of incontinence was not employment related.

In an undated letter to a congressional representative, appellant requested "consideration for impotence and incontinence" which he had been experiencing. In a January 3, 2006 letter, the representative indicated that he was forwarding the material to the Office, the undated letter was received by the Office on January 6, 2006. Appellant resubmitted a January 21, 2004 report from Dr. Ross Rames, a urologist, who stated that for erectile dysfunction, bladder outlet obstruction decreased contractility and nocturnal urge incontinence there was a high probability they were connected to appellant's back injury. Dr. Rames provided an impairment rating for the penis and loss of bladder function.

The record contains additional medical evidence that was submitted after the May 19, 2004 merit decision. In a September 20, 2005 report, Dr. John Lucas, a neurologist, provided results on examination and an opinion as to the degree of permanent impairment in the upper extremities. In the history provided Dr. Lucas indicated that he had reviewed Dr. Rames' evaluation and agreed that appellant had clear evidence of nerve injury causing the conditions noted by Dr. Rames. He agreed "this is on the basis of nerve injury from his back injury and would therefore agree with [Dr. Rames'] impairment ratings."

By decision dated January 11, 2006, the Office determined that appellant's request for reconsideration of the May 19, 2004 decision was untimely. The Office further determined that the request for reconsideration failed to show clear evidence of error.

LEGAL PRECEDENT

To be entitled to a merit review of an Office decision denying or terminating a benefit, a claimant must file his application for reconsideration within one year of the date of that decision.[1] The Board has found that the imposition of the one-year time limitation does not constitute an abuse of the discretionary authority granted the Office under section 8128(a) of the Federal Employees' Compensation Act.[2]

The Office, however, may not deny an application for reconsideration solely on the grounds that the application was not timely filed. When an application for reconsideration is not timely filed, the Office must nevertheless undertake a limited review to determine whether the application establishes clear evidence of error.[3] Office regulations and procedure provide that

[1] 20 C.F.R. § 10.607(a).

[2] *Leon D. Faidley, Jr.*, 41 ECAB 104, 111 (1989).

[3] *See* 20 C.F.R. § 10.607(b); *Charles J. Prudencio*, 41 ECAB 499, 501-02 (1990).

the Office will reopen a claimant's case for merit review, notwithstanding the one-year filing limitation set forth in 20 C.F.R. § 10.607(a), if the claimant's application for reconsideration shows clear evidence of error on the part of the Office.[4]

To establish clear evidence of error, a claimant must submit evidence relevant to the issue which was decided by the Office.[5] The evidence must be positive, precise and explicit and must manifest on its face that the Office committed an error.[6] Evidence which does not raise a substantial question concerning the correctness of the Office's decision is insufficient to establish clear evidence of error.[7] It is not enough merely to show that the evidence could be construed so as to produce a contrary conclusion.[8] This entails a limited review by the Office of how the evidence submitted with the reconsideration request bears on the evidence previously of record and whether the new evidence demonstrates clear error on the part of the Office.[9] To show clear evidence of error, the evidence submitted must not only be of sufficient probative value to create a conflict in medical opinion or establish a clear procedural error, but must be of sufficient probative value to *prima facie* shift the weight of the evidence in favor of the claimant and raise a substantial question as to the correctness of the Office decision.[10]

ANALYSIS

Appellant submitted an undated letter which was originally sent to a congressional representative rather than to the address provided by the Office for reconsideration in the May 19, 2004 decision. On January 3, 2006 the congressional representative forwarded the letter to the Office. The date of the application for reconsideration is therefore January 3, 2006.[11] Since this is more than one year after the May 19, 2004 merit decision, it is an untimely application for reconsideration.

As noted, the clear evidence of error standard is a difficult standard to meet that requires the evidence be sufficient to *prima facie* shift the weight of the evidence to appellant. The

[4] 20 C.F.R. § 10.607(b); Federal (FECA) Procedure Manual, Part 2 -- Claims, *Reconsiderations*, Chapter 2.1602.3d (January 2004). Office procedure further provides: "The term clear evidence of error is intended to represent a difficult standard. The claimant must present evidence which on its face shows that the [Office] made an error (for example, proof that a schedule award was miscalculated). Evidence such as a detailed, well-rationalized medical report which, if submitted before the denial was issued, would have created a conflict in medical opinion requiring further development, is not clear evidence of error." *Id*. at Chapter 2.1602.3c.

[5] *See Dean D. Beets*, 43 ECAB 1153, 1157-58 (1992).

[6] *See Leona N. Travis*, 43 ECAB 227, 240 (1991).

[7] *See Jesus D. Sanchez*, 41 ECAB 964, 968 (1990).

[8] *See Leona N. Travis, supra* note 6.

[9] *See Nelson T. Thompson*, 43 ECAB 919, 922 (1992).

[10] *Leon D. Faidley, Jr., supra* note 2.

[11] The date is determined by evidence of mailing, if available; otherwise, the date of the letter is used. Federal (FECA) Procedure Manual, Part 2 -- Claims, *Reconsiderations*, Chapter 2.1602.3 (January 2004).

underlying issue in the case is a medical issue: whether the medical evidence is sufficient to establish appellant's impotence or incontinence as causally related to the employment injury. The Office denied the claim on the grounds that the medical evidence did not contain a reasoned medical opinion based on a complete and accurate background. Appellant resubmitted a January 21, 2004 report from Dr. Rames, who stated that for erectile dysfunction, bladder outlet obstruction decreased contractility and nocturnal urge incontinence there was a high probability they were connected to the back injury. The Office had noted in its merit decision that Dr. Rames failed to provide a complete background or a reasoned medical opinion. With respect to new medical evidence, Dr. Lucas indicated in a September 20, 2005 report that he had reviewed Dr. Rames evaluation and agreed that appellant had clear evidence of nerve injury causing the conditions noted by Dr. Rames. He agreed this was on the basis of nerve injury from appellant's back injury. Dr. Lucas did not provide a complete factual and medical history or a reasoned medical opinion on causal relationship between the diagnosed conditions and federal employment. The report is not of such probative value that *prima facie* shifts the weight of the evidence in appellant's favor.

The remainder of the evidence submitted includes reports from Dr. Dana King, a family practitioner, as well as diagnostic studies, which do not address the relevant issues. The Board accordingly finds that the evidence is not sufficient to establish clear evidence of error in this case.

CONCLUSION

The Office properly refused to reopen the claim for further merit review pursuant to 5 U.S.C. § 8128(a).

ORDER

IT IS HEREBY ORDERED THAT the decision of the Office of Workers' Compensation Programs dated January 11, 2006 is affirmed.

Issued: October 11, 2006
Washington, DC

Alec J. Koromilas, Chief Judge
Employees' Compensation Appeals Board

Michael E. Groom, Judge
Employees' Compensation Appeals Board

James A. Haynes, Alternate Judge
Employees' Compensation Appeals Board